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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 02M-103  
01734

In the Matter of Application of	)	
	)	
<b>EchoStar Communications Corporation,</b>	)	<b>CS Docket No. 01-348</b>
(a Nevada Corporation), <b>General Motors</b>	)	
<b>Corporation. and Hughes Electronics</b>	)	
<b>Corporation</b> (Delaware Corporations)	)	
	)	
(Transferors)	)	
	)	
and	)	
	)	
<b>EchoStar Communications Corporation</b>	)	
(a Delaware Corporation)	)	
	)	
(Transferee)	)	

### MEMORANDUM OPINION AND ORDER

**Issued:** November 18,2002

**Released:** November 20,2002

#### Preliminary Statement

1. This is a ruling on Petition to Intervene and Seek Continuance of Hearing ("Petition") filed by Advanced Communications Corporation ("Advanced") on November 1, 2002. The Petition cites as grounds for granting intervention Paragraph 298 of the Commission's Hearing Designation Order ("HDO")<sup>1</sup> and §§ 1.223 (petitions to intervene) and §1.205 (continuances) of the Commission's rules of hearing proceedings [47 C.F.R. §1.223 and §1.205].

2. Enforcement Bureau's Opposition to Petition to Intervene was filed on November 13,2002. Opposition to Petition to Intervene and **Seek** Continuance of Hearing also was filed by Echo Star Communications Corporation, General Motors Corporation and Hughes Electronics Corporation (collectively the "Applicants") on November 13,2002.

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<sup>1</sup> In the Matter of the Application of EchoStar Communications Corporation, et al., *Hearing Designation Order* FCC 02-284, released October 18, 2002 (any person seeking party status may file a petition to intervene in accordance with §1.223).

3. The Enforcement Bureau ("Bureau") notes that the Petition is procedurally deficient in failing to address the pleading to the Chief Administrative Law Judge. On the date that Advanced filed the Petition, November 1, 2002, there had not been an assignment of an administrative law judge. Under that circumstance, the rules specifically provide that the Chief Administrative Law Judge shall act on pleadings filed after a proceeding has been designated for hearing but before a law judge has been designated. *See* 47 C.F.R. §0.351(f). This failure of Advanced to properly designate a pleading caused delay in the Petition's receipt by the Bureau and a similar delay in its delivery to the Office of Administrative Law Judges.' However, there does not appear to be substantial prejudice caused by Advanced's oversight. Therefore, the Petition will be considered and decided on its merits in this ruling.'

### Intervention

4. Advanced is seeking to litigate in this proceeding a right to construct a DBS system at 110° W.L., the same orbital location that is at issue in this proceeding. In January 1996, the disputed spectrum was auctioned to MCI Telecommunications ("MCI") for \$682.5 million. The spectrum was later transferred by MCI to EchoStar, which transfer was approved by the Commission in 1999. *See HDO* at Para. 6 n.18. The applicable standard for intervention as a party<sup>4</sup> requires Advanced to show an interest in the proceedings and to further show how Advanced will assist the Commission in the determination of the issues in question under the *HDO*. *See* 47 C.F.R. §1.223(b). Advanced's Petition fails in both respects.

5. Advanced appealed its loss of the subject orbital location to the United States Court of Appeals for the District of Columbia Circuit and to the United States Supreme Court, without success.' Advanced recently petitioned the Court of Appeals for mandamus relief and that also was denied.' It now has pending before the Commission a Petition to Reopen based on Recently Obtained Previously Unavailable Evidence filed on April 3, 2002.

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<sup>2</sup> The Applicants addressed their Opposition to the Commission and to the Chief Administrative Law Judge.

<sup>3</sup> In the assignment *Order*, all parties were put on specific notice of the requirement to be "fully cognizant" of the Commission's **rules** and regulations concerning practice and procedure. *See Order* FCC 02M-102, released November 14, 2002.

<sup>4</sup> These are three subsections to Section 1.223. Section 1.223(a) applies to initial applications for construction permits, modifications or renewals and does not apply here. Section 1.223(b) is discretionary intervention which requires showings of interest and assistance to the decision-maker. **Section 1.223(c)** applies to late filed petitions to intervene and does not **apply here**.

<sup>5</sup> *See Advanced Communications Corp. v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, *Advanced Communications Corp. v. FCC*, 519 U.S. 1071 (1997). *See also Advanced Communications Corp. v. MCI Communications, Inc.*, 263 F. 3d 373 (8<sup>th</sup> Cir. 2001) (application of collateral estoppel to deny Advanced's civil claim).

<sup>6</sup> *Advanced Communications Corp.*, 2001 WL 1699340 (D.C. Cir. 2001)

6. It would be a waste of time and resources to grant Advanced party status in this proceeding and then stay the hearing to permit Advanced to continue to litigate its motion to reopen an unrelated proceeding that has been the subject of such extensive litigation. Certainly, in view of past litigation on the question of Advanced's right to the spectrum, the relief that is sought by Advanced is speculative at best. Also, to permit its litigation here would detract substantially from the public interest issues that the Commission has set for hearing in this proceeding. *See e.g. HDO* at Paras. 275-289. The Commission has held that "Section 1.223 (b) intervention is a matter of privilege, not right [and] before bestowing that privilege, the Commission must first weigh, among other things, the effect on expeditious disposition of the proceeding." *See Victor Muskat*, 31 FCC 2d 620,621 (1971). It requires little explanation to point out the adverse effect that Advanced's Petition would have on the "expeditious disposition" of this hearing.

7. It is significant that pursuant to §1.221(d) [47 C.F.R. §1.221(d)], the Commission, on its own motion, granted party status to fourteen entities that had filed petitions to deny the proposed merger. *See HDO* at Para. 297 and Appendix A (Petition to Deny filed February 4, 2002). Thus, there can be participation by interested entities who filed with respect to the merger and who may express views and offer evidence that would be useful to determining the public interest. There is no showing by Advanced that it is similarly situated. Nor has Advanced made any showing as to what it could offer that would be decisionally significant. This latter deficiency is particularly noteworthy since Advanced had not filed a petition to deny and seeks to join this case as a party late in the game. The affidavits offered by Advanced to support a motion to reopen, and cited by Advanced in support of intervention in this case, contain nothing of assistance to this proceeding. Therefore, the discretion exercised here must be to deny intervention.

### Continuance

8. Advanced argues that if permitted to intervene in order to assist in determining the public interest vel non in the requested merger, then this proceeding should be continued until Advanced's private interests are "fully adjudicated" through all appeals. The sum of the argument is that if Advanced is awarded the disputed orbital location in another proceeding, then one of the Commission's anticompetitive concerns would be ameliorated or negated. First, that argument fails to convince because the orbital spectrum sought in another proceeding in which Advanced has lost multiple appeals is highly speculative and thus fails to merit any continuance. Second, continuances envisioned by §1.205 relate to requests for additional time in "making any filings" or performing "any act" within prescribed periods of time, i.e., continuances to meet routine procedural filing requirements. And even in routine continuance requests, it is the Commission's policy that "extensions of time shall not be routinely granted." *See* 47 C.F.R. §1.46(a).<sup>7</sup>

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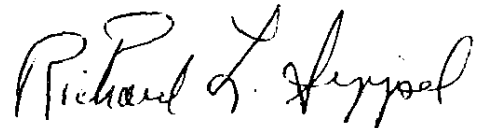
<sup>7</sup> Any request for a formal stay also would be denied because of a failure on the part of Advanced to show, inter alia, a likelihood of prevailing on the merits of its motion to reopen and related appeals. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

9. In any event, since Advanced will not be permitted to intervene as a party, its request for continuance of hearing is moot insofar as Advanced is concerned.

**Ruling**

Accordingly, **IT IS ORDERED** that the Petition by Advanced Communications Corporation to Intervene and Seek Continuance of Hearing filed on November 1, 2002, **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "Richard L. Sippel". The signature is written in a cursive, flowing style with a large initial 'R'.

Richard L. Sippel  
Chief Administrative Law Judge